No. 95-1065

(16)

Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,

Petitioners,

—v.—

PRO-CHOICE NETWORK OF WESTERN NEW YORK, BUFFALO GYN WOMENSERVICES, P.C., ERIE MEDICAL CENTER, PAUL J. DAVIS, M.D., BARNETT SLEPIAN, M.D., MORRIS WORTMAN, M.D., HIGHLAND OBSTETRICAL GROUP, and ALEXANDER WOMEN'S GROUP,

Respondents.

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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July 1, 1996

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Respondents.

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

New York submits this brief as *amicus curiae* in support of affirmance of the judgment of the United States Court of Appeals for the Second Circuit *in banc* in this matter. That judgment vacated a portion of the panel opinion holding unconstitutional, under the First Amendment, two provisions of a preliminary injunction issued by the District Court for the Western District of New York. These provisions, along with the other injunctive provisions which are not in dispute, were crafted by the district court to balance the competing interests

arising out of anti-abortion protests occurring in Western New York.

The State of New York has a paramount concern in assuring that the governmental interests at stake in this litigation are properly served. The State has a strong commitment to the protection of protest activities such as those engaged in by petitioners, which indisputably constitute a form of political speech protected by the First Amendment. "Defendants are entitled to express their views on abortion, 'particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted.' " *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1432 (W.D.N.Y. 1992) (citations omitted). However, the State has an equally strong interest in protecting its citizens' safety and well-being in the context of public debate. Through the exercise of its police powers, the State must ensure that the right to freedom of expression is not manifested through incidents of violence.

THE INJUNCTIVE PROVISIONS AT ISSUE

The United States District Court for the Western District of New York, Richard J. Arcara, *Judge*, entered the preliminary injunction at issue in this litigation on February 14, 1992. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1417.[1] The injunction issued following an evidentiary hearing on

[1] Petitioners are the Reverend Paul Schenck and Dwight Saunders, two of the defendants in the original action. The other defendants include the organizations Project Rescue Western New York, Operation Rescue and Project Life of Rochester, and forty-eight individuals (collectively "Project Rescue").

The respondents, plaintiffs in the original action, are the health care providers Buffalo Gyn Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, and Alexander Women's Group, and a not-for-profit corporation, Pro-Choice Network of Western New York (collectively "Pro-Choice").

Pro-Choice's motion to convert a previously issued temporary restraining order (TRO) into an injunction.[2] The district court also considered evidence adduced at contempt hearings of five individuals (including petitioner Schenck) and Project Rescue of Western New York, each charged with violating the TRO. *See Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1421.

One of the two provisions of the injunction challenged by petitioners creates a fifteen-foot buffer zone around the facilities in the Western District of New York subject to protests, prohibiting demonstrations within fifteen feet of facility entrances and driveways, or within fifteen feet of any person or vehicle seeking access to or leaving such facility, but allowing two demonstrators to enter the buffer zone to engage in non-threatening conversation ("sidewalk counseling") with any person or group of persons.[3] The second challenged provision requires "sidewalk counselors" to "cease and desist" from their counseling and to leave the buffer zone if any one or group of persons sought to be "counseled" does not want "counseling" or wants to leave or walk away.[4]

[2] The TRO was issued to enjoin a blockade of a clinic in Western New York announced for September 28, 1990. Project Rescue held a peaceful demonstration on that date instead. *See Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1422.

[3] Paragraph 1(b) enjoins Project Rescue from:

> demonstrating within fifteen feet . . . of doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities [at which abortions are performed in the Western District of New York], or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed.

Pro-Choice Network v. Project Rescue, 799 F. Supp. at 1440.

[4] Paragraph 1(c) enjoins Project Rescue from:

> physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving . . . any facility at

The United States Court of Appeals for the Second Circuit, upon rehearing *in banc*, affirmed the two provisions except to the extent modified, and vacated the portion of the panel opinion invalidating the provisions. *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d Cir. 1995).[5] In the majority opinion,[6] the court applied *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516 (1994), and concluded that the injunction as a whole was content-neutral, and that both the fifteen-foot buffer zone provision and the "cease and desist" provision were constitutional because they burden no more speech than necessary to serve significant governmental interests. *Id.* at 381-93. The court directed that the language of the injunction be modified to conform to the

> which abortions are performed; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is subject to be counseled wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility . . . .

Pro-Choice Network v. Project Rescue, 799 F. Supp. at 1440.

[5] The original panel opinion is published as *Pro-Choice Network v. Schenck*, 67 F.3d 359 (2d Cir. 1994).

[6] The majority opinion was written by Judge Oakes, in which Chief Judge Newman and Judges Kearse, Miner, Walker, Leval, Calabresi, Cabranes, and Parker concurred. *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d at 381-93; Judge Winter concurred in the result in a separate opinion in which Chief Judge Newman and Judges Kearse, Mahoney, McLaughlin, Jacobs, Walker, Leval, Calabresi, and Cabranes concurred. *Id.* at 394-98. Judge Jacobs concurred in the result in a separate opinion in which Judge Mahoney concurred. *Id.* at 398-99. Judge Meskill dissented in a separate opinion in which Judge Altimari concurred. *Id.* at 399-409. Judge Altimari dissented in a separate opinion. *Id.* at 409-11.

district court's decision that the "cease and desist" provision only be enforced if the person or group of persons to be counseled "indicates, either verbally or non-verbally, that they do not wish to be counseled. . . ." *Id.* at 391 (quoting *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1434).

SUMMARY OF ARGUMENT

As this Court has recognized, in regulating protest activities in public fora, the State "has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 2526 (1994) ("*Madsen*"). The courts may regulate protest activities through content-neutral injunctions designed to protect the rights of all parties involved, and such injunctions will be upheld if they "burden no more speech than necessary to serve significant government interests." *Id.* at 2525.

New York asserts that the requisite "fit" between the objectives of the injunctive provisions at issue and the restrictions they impose on freedom of speech is achieved in this case when measured from the perspective of the State's concern for the safety and welfare of its citizens—protesters and patients alike. In reaching the conclusion that the State's interest in preserving law and order and promoting the free flow of traffic justifies the challenged injunctive provisions, some deference should be given to the findings of the court issuing the injunction, based upon its familiarity with the facts and the background of the dispute between the parties. *See Madsen*, 114 S. Ct. at 2527. Deference to the issuing court's assessment of the illegalities it has identified and to the remedies needed to redress them allows, indeed encourages, swift and effective responses to exigent situations.

Here, the district court designed an injunction, after extensive evidentiary hearings, which was tailored to the facts

before it but which "would apply equally to protests that support abortion, or indeed, to protests supporting or opposing any other cause." *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1433. The carefully crafted injunctive provisions should be allowed to stand, and the judgment of the Second Circuit sitting *in banc* affirmed.

ARGUMENT

I

THE FIFTEEN-FOOT FLOATING BUFFER ZONE BURDENS NO MORE SPEECH THAN NECESSARY TO PROTECT THE GOVERNMENTAL INTERESTS AT STAKE

In *Madsen*, this Court upheld the provision of an injunction prohibiting anti-abortion demonstrators from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right-of-way or private property within thirty-six feet of the property line of a clinic that performs abortions, as a means of ensuring access to the clinic. *Madsen*, 114 S.Ct. at 2526-28. The Court viewed this total ban on protest activity within the court-mandated thirty-six-foot "buffer zone" as necessary to accomplish the objectives identified by the issuing court of preventing protesters from impeding access to the clinic by congregating on the paved portion of the street, marching in front of the clinic's driveways, and milling around vehicles approaching the clinic so that "sidewalk counselors" would have the opportunity to distribute anti-abortion literature to the vehicles' occupants. *Id.* at 2526-27. As the Court noted:

> "The type of focused picketing prohibited by [the state court injunction] is fundamentally different from more generally directed means of communication that may not be completely banned in [public places]". Here the picketing is directed primarily at patients and staff of the clinic.

Madsen, 114 S.Ct. at 2527 (quoting *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (bracketed words in original; parenthesis omitted)).

In the present case, the more conservative fifteen-foot buffer zone was imposed for nearly identical reasons. The district court found that Project Rescue "constructively blockades" clinics, *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1424, and that demonstrators "crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff." *Ibid.* The district court also found that the protesters "routinely congregate in or near the driveway entrances to the facility parking lots," thereby "creat[ing] a danger to both the occupants of the cars and the demonstrators themselves." *Ibid.*[7]

That the buffer zone provision in this case provides for a "floating" fifteen-foot radius from clinic entrances and persons or vehicles entering or leaving such facilities, as opposed to the stationary zone in *Madsen*, does not render the fifteen-foot buffer zone unconstitutional. The buffer zone floats around individuals to protect public safety and preserve law

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[7] The First Amendment does not require a demonstration of intransigence with respect to a narrower order before an injunction tailored to prevent harmful conduct may be implemented. As Judge Oakes correctly observed for the *in banc* majority:

> nothing in *Madsen* states, or even implies, that a TRO must fail before a broader injunction may be imposed; the *Madsen* Court simply noted that the failure of an initial injunction to accomplish its purpose is one factor which "may be taken into consideration" in evaluating the constitutionality of a subsequent, broader order.

Pro-Choice Network of Western New York v. Schenck, 67 F.3d at 389 (quoting *Madsen*, 114 S.Ct. at 2527). The purpose of the TRO in this case was simply to maintain the status quo until a full review of the facts and legal arguments could occur. *Id.* at 388-89.

and order by ensuring that a reasonable distance is maintained between the protesters and those entering and leaving the clinics. The district court fashioned this relief after finding, *inter alia*, that patients, patient escorts and clinic personnel are forced to run a "gauntlet of harassment and intimidation," *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1424, a type of focused demonstration which often degenerates into pushing and shoving with a high probability of escalating physical confrontation that causes immediate threat to public safety and order.

Similarly, the fifteen-foot buffer zone floats around vehicles entering and leaving the clinics to protect both the occupants and the protesters from physical injury. The district court found this to be a particularly significant hazard based on its finding that drivers are often "intimidated or confused" by the demonstrators. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1424.

In assessing the necessity for the fifteen-foot buffer zone provision, the district court's findings and conclusions are entitled to some deference even under the heightened review of content-neutral injunctions. *Madsen*, 114 S.Ct. at 2527. With respect to the need for the floating buffer zone to protect law and order and the free flow of traffic, of particular significance are the district court's findings that the nature of the protest activities involved impairs the ability of "[l]ocal law enforcement . . . to respond effectively to plaintiffs' complaints about 'pro-life' demonstrators harassing patients and blocking access to the clinics." *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1426. The district court stated:

> Defendants participate in their 'rescue' activities on a continual basis and the local police do not have the resources necessary to monitor the situation constantly. Often times, when they respond to a complaint, the demonstrators simply disperse, only to return later when the police depart. Even when police arrest a 'pro-life' demonstrator for harassing a patient, successful prosecution is often difficult because the patient is reluctant to testify or cooperate out of fear that her identity might be made public. Furthermore, the record shows that arrest and conviction pursuant to local laws has not deterred defendants from repeatedly engaging in their illegal pattern of activity.

Ibid. The fifteen-foot floating buffer zone provision was crafted in part because of the absence of any effective means to monitor the protest activities, which have then turned violent and led to physical injuries.[8] The provision operates in this vacuum by maintaining separation between the individuals at the site of the protest, thereby defusing the situation before it escalates into a dangerous confrontation. At the same time, the floating buffer zone protects the State's strong interest, identified in *Madsen*, 114 S.Ct. at 2526, in promoting the free flow of traffic on public thoroughfares and the unimpeded exercise of its citizens' right to travel. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1434.

The fifteen-foot buffer zone provision devised by the district court burdens no more speech than necessary to protect the governmental interests at stake. In recognition of the fact that the buffer zone operates around clinic entrances as well as around people seeking access to and leaving the facilities, the district court made an exception for "sidewalk counselors," permitting two "counselors" to engage in non-threat-

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[8] This Court can take judicial notice of incidents of violence and vandalism in and around clinics that provide abortion services in other States. There has also been extensive litigation relating to clinic incidents in the Second Circuit alone. *See, e.g., People of the State of New York v. Operation Rescue National*, 80 F. 3d 64 (1996); *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir.), *cert. denied sub nom. Syversen v. Summit Women's Center West, Inc.*, __ U.S. __, 114 S. Ct. 185 (1993); *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Upper Hudson Planned Parenthood, Inc. v. Doe*, 836 F. Supp. 939 (N.D.N.Y. 1993), *aff'd mem.*, 29 F.3d 620 (2d Cir. 1994).

ening conversation "with each person or group of persons they are seeking to counsel." *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1440; *see also id.* at 1434. Thus, unlike the thirty-six-foot buffer zone in *Madsen* which was off limits to all protesters, the fifteen-foot buffer zone provision in this case is not absolute.

In addition, the relatively small distance of fifteen feet ensures that the protesters are a constant presence, leaving them with ample means to communicate their message:

> Defendants may still assemble near plaintiffs' clinics so long as they remain outside the fifteen foot "clear zones." They can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by. If confined to the area fifteen feet away from the entrances of the clinics' driveways and parking lots, defendants and their picket signs will still be visible to people approaching the clinic and their message will still be conveyed.

Pro-Choice Network v. Project Rescue, 799 F. Supp. at 1437. In *Madsen*, this Court took into account the fact that "[p]rotesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots." 114 S. Ct. at 2527.

The fifteen-foot buffer zone provision in this case should be upheld because it protects the governmental interests in safety and public order which are at stake, while not imposing any significant reduction in the protesters' ability to convey their message, to be both seen and heard. Moreover, the provision is fully justified on the evidentiary record before the district court, which crafted the provision only after conducting extensive proceedings to gain "familiarity with the facts and the background of the dispute between the parties." *Madsen*, 114 S. Ct. at 2527. Accordingly, the provision should not be disturbed on appellate review.

II

THE "CEASE AND DESIST" PROVISION REGULATES "CAPTIVE AUDIENCE" SOLICITATIONS WITHOUT CONSIGNING THE PROTESTERS TO A DISTANCE THAT EFFECTIVELY SILENCES THEM

The "cease and desist" provision focuses on the "sidewalk counselors," described by the district court as "comprised of a small group of dedicated 'pro-life' activists who station themselves in front of plaintiffs' medical facilities on a regular basis." *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1425. The district court noted that "[m]any of the 'sidewalk counselors' . . . have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff." *Ibid.* The court also described a comparable zeal on the part of the patient escorts which "often serves only to exacerbate an already difficult situation," *id.* at 1425, n. 6, noting that "[t]he patient escorts often respond by raising their voices in order to drown out the 'counselors' ' message, and attempt to block and impede the 'sidewalk counselors' from following the patients." *Ibid.*

It is in this context that the "cease and desist" provision serves to protect the health and safety of all involved. The "sidewalk counselors" must "cease and desist" from their "counseling" only at the point that the targeted person or group of persons express their wish not be "counseled." The district court found that it is precisely at this juncture that the non-threatening efforts of the "sidewalk counselors" to persuade their targets erupt into heated encounters. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1425.

The pinpointing by the lower court of the precise sequence of events which threatens public safety and order satisfies the "narrow tailoring" required in the context of constitutionally protected activity. *See, e.g., NAACP v. Claiborne*

Hardware, 458 U.S. 886, 916 (1982) ("precision of regulation" is required). It also reflects this Court's recognition that ostensibly peaceful speech-related acts that are intertwined or "entangled with violence" are the proper subject of state regulation. *Milk Wagon Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 294-95 (1941) ("Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct").

At the same time, the "cease and desist" provision, unlike the 300-foot "no approach" provision struck down in *Madsen*, 114 S. Ct. at 2530, does not burden more speech than necessary to accomplish its goal. In *Madsen*, this Court held unconstitutional a State's attempt to prevent clinic patients from being "stalked" or "shadowed" by ordering "petitioners to refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." *Madsen*, 114 S. Ct. at 2529. The Court concluded that when a prohibition sweeps that broadly, enjoining "*all* uninvited approaches" without evidence that the speech is "independently proscribable," it runs afoul of the principle "that in public debate, our citizens must tolerate insulting, and even outrageous, speech in order to provide the adequate breathing space to the freedoms protected by the First Amendment." *Ibid.* (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

The "cease and desist" provision, by contrast, does not prohibit the "sidewalk counselors" from approaching persons seeking entry to the facilities, nor does it consign them to a distance that is tantamount to silencing them. Even if the target expresses an immediate wish not to be "counseled," the injunction merely requires the "counselors" to retreat fifteen feet, where they can be seen and heard without being confrontational and dangerously provocative. As Judge Oakes aptly concluded for the *in banc* majority: "[I]t is the demonstrators' physical proximity which is regulated rather than

their message." *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d at 392.

The "cease and desist" provision is consistent with this Court's recognition that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992). As constructed, the "cease and desist" provision allows for the expression of the protesters' message while at the same time recognizing that women seeking to utilize facilities that provide abortion services can be a "captive audience." In *Madsen*, this Court analogized the State's strong interest in protecting privacy in the home recognized in *Frisby v. Schultz*, 487 U.S. 474, with its interest in protecting medical privacy. *Madsen*, 114 S.Ct. at 2526. The Court acknowledged "that while targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstances." *Ibid. See also International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (solicitation in public airports); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (political advertising on public transit system); *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990) (subway panhandling).

The "cease and desist" provision, like the buffer zone, thus furthers the State's strong interest in protecting the safety and well-being of its citizens while burdening no more speech than necessary. For this reason, the "cease and desist" provision of the injunction also passes constitutional muster under *Madsen*, and should be sustained on appeal.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Second Circuit *in banc*, vacating the portion of the panel opinion striking down the fifteen-foot buffer zone provision and the "cease and desist" provision as unconstitutional under the First Amendment and affirming these provisions as modified.

Dated: New York, New York
July 1, 1996

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